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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 873

EDWARD R. ESTER AND LORRAINE M. ESTER, HIS WIFE; DONALD F. OWENS AND JEAN OWENS, HIS WIFE; AND ARTHUR G. BARNETT AND VIRGINIA N. BARNETT, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals, as amended on denial of rehearing, is reported at 250 F. 2d 139. Excerpts from the opinion and all of the amendment are set out in the appendix to the petition (Pet. App. 33–37).[1]

[1] Petitioner has failed to comply with Rule 23 (1) (i) of this Court, which requires that a copy of the opinion of the Court of Appeals be appended to the petition. For the Court's convenience we have set forth the full opinion, as amended on denial of rehearing, as an appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered October 30, 1957 (Pet. App. 38–39). A timely petition for rehearing was denied on December 23, 1957 (Pet. App. 36–37). The petition for a writ of certiorari was filed March 22, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The United States brought suit seeking damages and specific performance of a contract to remove temporary war housing resting on land it held under condemnation of temporary use. The decision of the district court denied specific performance but awarded damages. The court of appeals reversed and remanded for clarification of findings or for retrial. The question presented by this petition, petitioners having subsequently acquired fee title to the underlying land, is whether the claim that the United States had lost all interest in the underlying realty because of alleged nonpayment of just compensation constitutes a complete defense to the Government's action.

STATEMENT

The facts of this case, so far as pertinent here, may be summarized as follows:

In October 1954, the United States filed a complaint seeking redress for the violation of its rights growing out of the failure of petitioners and others to remove temporary war housing from lands the use of which had been acquired by the United States for such housing.

By condemnation proceedings instituted during World War II, the United States acquired exclusive temporary use of certain land in Seattle for a temporary housing project; the project being constructed under the authority of the Lanham Act, 54 Stat. 1125, 42 U. S. C. 1521, *et seq.* The Government's term for the use of the land was extended through June 30, 1956. By amendments to the Lanham Act, Congress directed that "the Administrator shall, as promptly as may be practicable and in the public interest, remove (by demolition or otherwise) all housing under his jurisdiction which is of a temporary character * * *." 64 Stat. 48, 64, 72–73. In order to comply with this congressional mandate, the Administrator of the Public Housing Administration, through the Housing Authority of the City of Seattle, issued public invitations for bids for the sale and removal of 10 temporary war housing buildings, containing 144 dwelling units, and for the clearance of the real estate site.

A contract of sale of these buildings to Century Investment Corporation was executed.[2] After August 21, 1953, Century purported to convey four of the buildings in the project without imposing the condition or obligation that they be removed from the site.[3] These buildings remain on the site and are

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[2] While the Century Investment Corporation and Virgil Pague, president and one of its incorporators, were defendants and appellants with the petitioners in the courts below, neither Pague nor Century has petitioned for certiorari.

[3] Paragraph 8 of the general conditions of the contract here involved provides (R. 17): "8. *Assignment.*—Neither this con-

being used for private commercial dwelling purposes (Fdg. X, R. 68).[4] Building 104 was purportedly acquired by petitioners Arthur G. Barnett and wife and Donald F. Owens and wife on January 20, 1954, directly or indirectly from Century. On January 20, 1954, petitioners Barnett, Owens and their wives jointly acquired an interest in the lots underlying building 104. Building 105 was purportedly acquired by petitioners Edward R. Ester and wife in November 1953 from Carl W. Pague, who had acquired the same from Century (R. 27). Thereafter, petitioner Ester acquired an interest in the lots underlying building 105 (Fdg. XI, R. 68–70).

None of the petitioners possessed an interest in the lands, temporary use of which had been condemned, at the commencement of those proceedings. They acquired their respective interests after the date of the contract with Century for the sale and removal of the buildings. By the declaration of taking filed in the condemnation proceedings on June 15, 1945, the judgment entered therein on June 16, 1945, and by subsequent judgments fixing compensation entered in that action, the United States was granted the right to renew its exclusive use from year to year without the consent of the owners of the land, not to exceed three years after the termination of the national emergency declared to exist by presidential proclamation of Sep-

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tract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U. S. C. 15.)"

[4] "R." references are to the printed record as filed in the court of appeals.

tember 8, 1939 (54 Stat. 2643). The Government filed timely notice, yearly, of its intention to renew its exclusive use, extending to February 21, 1956.[5]

Near the expiration date for removal of the buildings and clearance of the sites, Century asked the Seattle Housing Authority for an extension of 60 days in which to remove the buildings. The Acting Director of the Seattle Housing Authority purported to extend the time to January 15, 1954.[6] The district court found that petitioners had "full and complete knowledge" of the removal contract, and were "not innocent purchasers of same [the buildings] without knowledge and notice of the contract['s] expressed requirement that said buildings be removed from the site upon which they were situated * * *" (Fdgs. XIII, XIV, R. 71–72; Conc. X, 77–79). The court of appeals similarly refers to the "full and complete knowledge" of the petitioners (App., *infra*, p. 12).

The buildings not having been removed, the present action was instituted and relief both of a specific nature and in the form of damages was sought against the petitioners, Century, and other defendants. Af-

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[5] The Government further extended its exclusive use for another yearly period to February 21, 1957, but subsequently terminated its use as of June 30, 1956 (App., *infra*, p. 11, fn. 8; cf. Pet. 10).

[6] While the Seattle Housing Authority purported to extend the time for performance, the district court concluded that "there never was any general agency from the plaintiff [United States] to said organization [Housing Authority of the City of Seattle] or to Mr. Michaelson with power broad enough to generally authorize said organization or Mr. Michaelson to waive any of the terms and conditions of said contract" (Conc. V, R. 75).

ter a trial, an oral decision was given by the district court in favor of the United States, concluding that it was entitled to the specific and other relief sought. On October 20, 1955, findings of fact and conclusions of law were entered. The district court referred the case to a special master to determine the amount of damages. After the master's report was received, the court abrogated its earlier position and declined to order specific performance of the contract of removal and site clearance. The reasons stated for this action were (1) that the estate claimed by the United States would expire July 1, 1956, which would be only a little more than two months from the date of decision; (2) that the United States had no present intention of extending the time; and (3) that the defendants "would have the right of exclusive possession of said lands and the right to move said buildings back on said lands * * *" (Suppl. Fdg. III, R. 108–109). Rather than ordering such removal for a short period, the court determined to award damages.

The court of appeals reversed the judgment as to petitioners on the ground that the theory upon which the district court awarded damages was invalid. It agreed, however, with the United States that certain other theories were within the scope of the pleadings and might sustain an award of damages. The district court was authorized to determine this possible liability "either by construing the findings in the record or by proceeding to another trial, as may be thought proper" (App., *infra*, p. 18).

ARGUMENT

1. A reading of the opinion of the court of appeals (App., *infra*, pp. 9–20) shows that no question has been decided which justifies review by this Court. Petitioners succeeded in reversing the district court's judgment against them. The case has been remanded simply to give the United States an opportunity to prove its claim on theories within the scope of the pleadings other than the one the district court adopted. To deny the United States that opportunity at this time, as petitioners seek in asking summary reversal (Pet. 1, 30–32), would be unjust. Petitioners will have ample opportunity to seek review of any unfavorable judgment obtained in the future.

2. The petitioners' contention (Pet. 11, 13, 14, 19) that the Government cannot prove its case on a theory of trespass or implied contract to pay reasonable rental because the findings of the district court are clear, plain, and positive to the effect that the United States had lost all right to possession of the land because of failure to pay just compensation, and thereby title to its buildings had vested in the petitioners, is fully answered by the district court's finding, quoted above (*supra*, p. 6), that it would be approximately two months after its decision before the defendants (petitioners) "would have the right of exclusive possession of said lands". As the court of appeals expressly recognized (App., *infra*, p. 17), there is some uncertainty as to the meaning of the finding concerning exclusive possession, which had

been made in connection with the question whether specific performance should be ordered. In view of this, the finding certainly does not clearly have the meaning which the petitioners would give to it. Furthermore, the United States had, in fact, paid just compensation in the condemnation case[1] and, even if it had not, this would not be a ground for saying the condemnation proceedings were void, that the United States was a trespasser, or that title to its buildings had vested in the petitioners. Cf. *Bibb County, Georgia* v. *United States*, 249 F. 2d 228 (C. A. 5); *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C. A. 7).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari and the motion for summary reversal should be denied.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

APRIL 1958.

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[1] Rentals owing had been paid for all years. Taxes had not been paid for some recent years because of a refusal by the successors in interest to follow the established practice of submitting their tax bills to the administrative authorities who would then pay them. These facts are established in the condemnation proceeding of which the district court took judicial notice (Fdg. II, R. 63–64).

APPENDIX

United States Circuit Court of Appeals for the Ninth District

No. 15219

CENTURY INVESTMENT CORPORATION AND VIRGIL J. PAGUE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

ARTHUR G. BARNETT AND VIRGINIA N. BARNETT, HIS WIFE; DONALD F. OWENS AND JEAN OWENS, HIS WIFE; EDWARD R. ESTER AND LORRAINE M. ESTER, HIS WIFE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the Western District of Washington, Northern Division

Before: HEALY, FEE, and HAMLEY, *Circuit Judges.*

HAMLEY, *Circuit Judge:* This action involves the asserted breach of a contract to remove buildings from four tracts of land in Seattle, Washington. The suit was brought by the United States to obtain specific performance of the contract and damages for the delay in removing the buildings. Two corporations and twelve individuals were named defendants.

After a trial to the court without a jury, a judgment for damages in varying amounts was entered against the following defendants: Century Invest-

ment Corporation, Virgil J. Pague, Mr. and Mrs. Arthur G. Barnett, Mr. and Mrs. Donald F. Owens, and Mr. and Mrs. Edward R. Ester.[1]

Barnett, Owens, and Ester, joining in one appeal, contend that, as to them, the judgment cannot be sustained on the theory of breach of contract, as they were not privy to the contract. They further argue that, for various reasons, the judgment cannot be sustained on the theory adopted by the trial court, namely, that damages may be awarded as an equitable substitute for specific performance. Century and Pague, joining in another appeal, contend that the judgment must be reversed as to them because the contracting officer has not determined the amount of damages, and there is assertedly no proof of actual damages.

The facts which must be considered in passing upon these and other questions are established by the unchallenged findings and supplemental findings of fact.

The buildings in question were erected in 1945 as temporary wartime housing by the Public Housing Administration, an agency of the federal government. The land so utilized had been previously acquired by the United States under the condemnation provisions of the Lanham Act, as amended, 54 Stat. 1125, 42 U. S. C. A. § 1521 et seq. Under the terms of the judgments fixing compensation in the condemnation actions, the United States was given the option to renew its exclusive use from year to year, not to exceed three years after the termination of the

[1] The male members of these respective marital communities will be hereinafter referred to as if they were the only personal appellants. The action was dismissed as to Mrs. Virgil J. Pague and several other defendants not named above.

national emergency.[2] The government filed timely notice, yearly, of its intention to renew its exclusive use, extending to February 21, 1957.[3]

Prior to June 22, 1953, the administrator of the Public Housing Administration called for bids for the sale and removal of these and other temporary buildings. This action was taken pursuant to § 313 of the Lanham Act, as amended on August 18, 1952, by Ex. Ord. No. 10385, 42 U. S. C. A. § 1553. This section provides for the removal, by demolition or otherwise, not later than July 1, 1954 (except under certain specified conditions), of all temporary housing constructed under the provisions of subchapter IV of the Lanham Act.

The high bid for the purchase and removal of buildings Nos. 102, 103, 104, and 105 was submitted on behalf of Pague. The bid was accepted, but the balance of the purchase price was tendered on behalf of Century, then in the preliminary stages of incorporation. Pague was one of the incorporators. Century, but not Pague, was named in the contract, which was executed on July 14, 1953. Under this contract, Century purchased the buildings and agreed to remove them from the tracts on which they were situated, and to clear the sites by November 12, 1953. The Seattle Housing Authority, which represented the Public Housing Administration in connection with some details of this contract, later purported to extend this termination date to January 15, 1954. Century posted a five-thousand-dollar performance bond.

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[2] This was the national emergency which was declared to exist by the presidential proclamation of September 8, 1939 (54 Stat. 2743).

[3] The government subsequently terminated its use as of June 30, 1956.

On August 21 and October 5, 1953, Century sold buildings 102 and 103, respectively, to Pague, for $1,932 each, without imposing the condition or obligation that they be removed from the site. Pague later acquired an interest in the land underlying these buildings.

Century sold building 104 to R. M. Scougal, F. T. Crow, Pague, and the latter's brother, Carl W. Pague, without imposing the condition or obligation that it be removed from the site. On January 20, 1954, Barnett and Owens purchased this building from these persons, for $6,413.09. At the same time, Barnett and Owens acquired an interest in the land under building 104.

In November 1953, Ester acquired building 105 from Carl W. Pague for $3,590. Carl W. Pague had previously acquired this building from Century for $1,932. Ester later acquired an interest in the land underlying this building. In selling this building, neither Century nor Carl W. Pague imposed the condition or obligation that it be removed from the site.

The purchase of building 104 by Barnett and Owens was a partnership venture, the details of which were handled by Barnett. Prior to making this purchase, Barnett had full and complete knowledge of the contract obligation of Century to remove the building from its then site. The preliminary title report which Barnett and Owens secured also indicated that the land on which building 104 was located was then held for the exclusive use of the government. Ester and Virgil J. Pague had similar information concerning buildings 102, 103, and 105, and the land on which they were situated, prior to their respective purchases.

Each of the above-named appellants who now assert ownership of these buildings, endeavored, prior to his acquisition, to secure an express waiver of Century's contract obligation. Such a waiver was never obtained. After acquiring his building, however, each such appellant secured a resolution of the city of Seattle permitting the building to remain on site for a period of five years.

By action of the Seattle Board of Public Works, the government's use of the street area underlying these buildings terminated on October 28, 1953. Through the same city agency, the appellants who now claim these buildings were, on December 9, 1953, granted such street use. Each of the buildings in question has been altered so as to comply with the requirements of the Seattle building code.

The government instituted this action on October 4, 1954. After a trial, findings of fact favorable to the government were entered. Based thereon, conclusions of law were entered, in which it was held that the government was entitled to a decree of specific performance enforceable against all appellants. It was also held that the government was entitled to damages from all appellants, to be measured by the net revenues they had received from the rental of the buildings. The court determined that an accounting would be required to enable the court to fix the amount of damages to be awarded. In conformity with these conclusions, an order was entered referring the matter to a special master for an accounting and report. The master's supplemental report was later approved by the trial court.

Thereafter, supplemental findings of fact were entered. It was found that the government had not proved that it had paid the future ascertainable installments of just compensation which it was obli-

gated to pay to entitle it to continued exclusive possession of the tracts in question. Because of this, the court found that the government had not fully sustained its burden of proving its continued exclusive right to possession of the land in question.

The court further found that the present and only estate in the land now claimed by the government would expire on July 1, 1956, and that the government had no intention of renewing or extending its estate. Appellants who now claim the buildings would then, the court found, have exclusive possession of the land. In view of these circumstances, the court found that the government was not entitled to specific performance. It was further found that it would be more just and equitable to limit the government's relief to monetary damages based on "fair, reasonable, and just compensation * * * for their [defendants] failure to remove and clear the sites of and for their wrongful commercial use of, said buildings. * * *"

Based on the supplemental report of the special master, it was found that the amount to which the government was entitled by way of damages, under this theory, was $5,937.13 from Virgil J. Pague and Century, jointly and severally; $3,709.31 from Barnett and Owens, jointly and severally; and $2,432.59 from Ester. These sums represented the net revenue received by the respective appellants from rental of the buildings, as determined by the special master. It was found that the special master was entitled to a reasonable fee and expenses in the sum of $2,583, three fourths of which should be paid by appellants, jointly and severally. Conclusions of law and a judgment consistent with the findings and supplemental findings were entered on April 26, 1956.

We turn first to the questions presented by the appeal of Barnett, Owens, and Ester.

The judgment against these three was not intended as an award of damages for breach of contract, since they were not privy to the contract. The theory of the award against them, as indicated by what has been said above, is that they were amenable to a decree of specific performance, but that, because the government had not proved its continued exclusive right to possession of the land, it would be more equitable to allow damages only, to be measured by the net rentals these appellants had received.

There are at least two reasons why the judgment against Barnett, Owens, and Ester cannot be sustained on this theory. One of these is that, since they were not privy to the contract, they were no more amenable to specific performance (and hence to an equitable substitute for specific performance) than they were to damages for breach of contract.[4]

The other reason why the judgment against Barnett, Owens, and Ester cannot be sustained on this theory has to do with the measure of damages which was applied. A monetary award may be made in an action brought for specific performance, either by granting an alternative prayer for damages for breach of contract (*Gulbenkian* v. *Gulbenkian* (2 Cir.), 147 F. (2d) 173), or to provide necessary supplemental relief in addition to a decree of specific performance (*Daniels* v. *Brown Shoe Co.* (1 Cir.), 77 F. (2d) 899).

The award here made against these three appellants was not, and as we have seen could not have been,

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[4] An exception to this rule is sometimes applied in the case of contracts to purchase land. See *Ebensberger* v. *Sinclair Refining Co.* (5 Cir.), 165 F. (2d) 803.

based on breach of contract. Nor was the award intended as supplemental relief in addition to a decree of specific performance, since no such decree was entered.

It may be that the power to grant supplemental monetary relief in such actions includes the power to grant substituted monetary relief. But if so, and despite the broad discretionary powers lodged in a court of equity,[*] the measure of the award must still accord with some recognized standard. Here, the award was not based upon expense incurred or damages sustained by the government, or upon the reasonable rental value of the land while appellants were using it for commercial purposes. Instead, the award was based upon the net rentals received by appellants from their own buildings during the time the government had the right of possession of the land. An award on this basis, entirely disassociated from the principle of compensatory damages, is not sustainable on the theory adopted by the trial court.

The government urges, however, that in any event the award can be sustained on the theory of constructive trust. *Angle* v. *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 151 U. S. 1, is cited as authority for this proposition. In that case, the defendant was declared a trustee ex maleficio in respect to certain property, upon a showing that the property had been acquired through fraudulent inducement to breach a contract.

There is, in our case, no proof or finding that the conduct of Barnett, Owens, or Ester was fraudulent in any respect. Nor is it shown or found that they did anything to induce Century to breach its con-

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[*] See *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240.

tract. The most that is shown is that Barnett, Owens, and Ester knew of the contract, and of its breach, at the time they acquired their interests in the lands and buildings. Such a showing provides no basis for the imposition of a constructive trust.

Other theories advanced by the government include trespass, unjust enrichment, and quasi contract.

The awards against Barnett, Owens, and Ester were not made of any of these theories. Nor did the amounts awarded conform to the measure of damages appropriate under any of these theories.

It is nevertheless true that the complaint is broad enough to sanction damages on the theory of trespass or an implied contract to pay the reasonable rental value of the lands. It is possible that there may have been such a tresspass, or the existence of circumstances from which a contract to pay the reasonable rental value of the lands may be implied.

This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. Barnett, Owens, and Ester argue that the trial court so held in its supplemental findings of fact.

We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. It may be that the government was not prompt in completing its payments for previous months or years. But, if such payments were ultimately made, the government's exclusive right of pos-

session during such period, at least as against these appellants, would seem to be established.

In our view, justice therefore requires that the judgment as to Barnett, Owens, and Ester be reversed and the cause remanded to the trial court. Upon remand, the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred or monetary damages sustained by the government.

This brings us to the questions presented by the appeal of Century and Pague.

For some of the reasons already stated, the judgment, in its present form, is not sustainable as to them. If damages may be awarded as an equitable substitute for specific performance, they must be measured on a different basis than that employed by the trial court.

But Century was a contracting party, and, under the findings clearly breached its contract to remove the buildings from the sites.*

Century argues, however, that, because of certain terms of the contract, the government is, at most, entitled only to reimbursement for expenses incurred by reason of Century's breach. The company also argues that damages may not be awarded by a

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*The government states in its brief, for the evident purpose of sustaining the judgment in its present form, that this is not a legal action for breach of contract, but is a proceeding seeking equitable relief. Examination of the complaint, however, indicates that both kinds of relief were sought.

court because there has been no determination of damages by the contracting officer, as provided in the contract.[1]

Both of these contentions were considered and rejected in *Aerial Lumber Co.* v. *United States* (9 Cir.), 239 F. (2d) 906.

We hold that, as to Century, the judgment should be reversed and the cause remanded for a trial on the issue of damages only, arising by reason of its breach of contract. The measure of such damages would appear to be the same as indicated above with respect to Barnett, Owens, and Ester.

Pague's appeal presents additional questions. Under the judgment, damages in the sum of $5,937.13 were awarded against him and Century, jointly and severally. It was therefore apparently the view of the trial court that Pague was liable for the same reason that Century was liable, viz., because he had contracted to remove the buildings and clear the sites.

The original bid to buy and remove the buildings

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[1] The contract provisions in question read as follows:

"* * * The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security."

"* * * In the event the Purchaser fails to complete the removal and clean-up operations within such period of time, the Government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the Purchaser with the cost of removing the dwellings and cleaning up the site without crediting the Purchaser with the salvage value of the material or construction work removed."

was made on Pague's behalf. He was also one of the incorporators of Century. He was not, however, one of the contracting parties. The findings and conclusions entered by the trial court do not indicate the basis on which it was held that Pague was liable in damages. There was no finding that he is the alter ego of Century.

From what has just been said, it is plain that Pague is not liable on the theory of breach of contract. It would appear, however, that Pague is in about the same position as Barnett, Owens, and Ester, with respect to possible liability on the theory of trespass or implied contract to pay reasonable rental. The judgment against Pague must therefore be reversed and the cause remanded for further proceedings similar to those which have been specified as to Barnett, Owens, and Ester.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

U. S. GOVERNMENT PRINTING OFFICE: 1968